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**United States District Court**  
For the Northern District of California

UNITED STATES OF AMERICA,

No. CR 14-0013 CW

8 Plaintiff,

**ORDER GRANTING  
§ 2255 MOTION**

v.

ISAIAH DESHAWNTA MCGARY,

Defendant.

12 /

Movant Isaiah McGary, represented by counsel, moves under 28 U.S.C. § 2255 to vacate, set aside or correct his sentence. Respondent has filed an opposition to the motion and Movant has filed a reply.<sup>1</sup> Having considered all of the papers filed by the parties and the record in this case, the Court will GRANT the motion.

<sup>1</sup> The government has filed a motion to stay the proceedings related to this motion pending the Supreme Court's decision in Beckles v. United States, Supreme Court Case No. 15-8544, which Movant opposes. The government argues that a stay will promote judicial economy. However, judicial economy is not alone enough to justify a potentially lengthy stay in habeas cases. Yong v. INS, 208 F.3d 1116, 1120-21 (9th Cir. 2000). Moreover, it appears that time is of the essence in this case. Accordingly, the motion to stay is DENIED. Docket No. 36. Execution of any new sentence will be stayed and contingent on the Supreme Court's decision in Beckles, but the parties will be able to proceed with any appeals. If Movant would be eligible for release under any new sentence before the resolution of Beckles, the Court will entertain argument regarding whether he should be released on bail.

1 BACKGROUND  
23 A. Procedural Background  
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On April 7, 2014, Movant plead guilty, pursuant to a plea agreement, to one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The plea agreement contained a collateral attack waiver. Docket No. 13 at ¶ 5. Applying United States Sentencing Guideline (USSG) § 2K2.1(a)(2), the Presentence Report (PSR) indicated that Movant's base offense level was 24, because Movant had one prior conviction for a crime of violence, theft from a person, and one prior conviction for a controlled substance offense, possession of a controlled substance with intent to distribute. Section 2K2.1(a)(2) relies on the Career Offender Guideline, USSG § 4B1.2, for the definition of crime of violence. The PSR applied a three-level downward adjustment for acceptance of responsibility, resulting in a total offense level of 21. The PSR indicated that Movant should be classified in Criminal History Category IV, resulting in an advisory Guidelines range of fifty-seven to seventy-one months. If Movant's sentence had not been enhanced based on the crime of violence, his total offense level would have been 17, with a resulting advisory Guidelines range of thirty-seven to forty-six months.

In the plea agreement, the parties agreed to recommend a sixty-eight month aggregate sentence for both the felon in possession offense and a violation of supervised release for a prior federal conviction.

At sentencing, the Court found that Movant's advisory Guidelines range was fifty-seven to seventy-one months and

1 sentenced him to sixty months of imprisonment. The Court also  
2 imposed a consecutive eight-month sentence for the violation of  
3 supervised release for a total sentence of sixty-eight months.  
4 Movant did not file a direct appeal but, on May 16, 2016, after  
5 the Supreme Court issued its decision in Johnson v. United States,  
6 135 S. Ct. 2551 (2015), he filed the instant § 2255 motion.

7       B.     Johnson v. United States

8       In Johnson, the Supreme Court addressed a challenge to the  
9 residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C.  
10 § 924(e), which provides that a defendant with three prior  
11 "violent felony" convictions faces a fifteen-year mandatory-  
12 minimum sentence if convicted of violating 18 U.S.C. § 922(g). 18  
13 U.S.C. § 924(e). The ACCA residual clause definition of "violent  
14 felony," which encompasses any crime that "involves conduct that  
15 presents a serious potential risk of physical injury to another,"  
16 is identical to the residual clause of the Guidelines' definition  
17 "crime of violence." The Ninth Circuit makes "no distinction  
18 between the terms 'violent felony' as defined in the ACCA and  
19 'crime of violence' as defined in § 4B1.2(a)(2) of the Sentencing  
20 Guidelines for purposes of interpreting the residual clauses."  
21 United States v. Spencer, 724 F.3d 1133, 1138 (9th Cir. 2013)  
22 (quoting United States v. Crews, 621 F.3d 849, 852 n.4 (9th Cir.  
23 2010) (internal alteration marks omitted)).

24       The Johnson Court held that the residual clause is so vague  
25 that it "both denies fair notice to defendants and invites  
26 arbitrary enforcement by judges." 135 S. Ct. at 2557.  
27 Accordingly, the Johnson Court held that an increase to a  
28 defendant's sentence under the clause "denies due process of law."

1 In Welch v. United States, 136 S. Ct. 1357 (2016), the Supreme  
2 Court held that Johnson is retroactive as applied to the ACCA.  
3 However, neither the Supreme Court nor the Ninth Circuit has  
4 addressed whether Johnson is retroactive as to the identical  
5 language in the Sentencing Guidelines.

## LEGAL STANDARD

7       A prisoner in custody under sentence of a federal court,  
8 making a collateral attack against the validity of his or her  
9 conviction or sentence, must do so by way of a motion to vacate,  
10 set aside or correct the sentence pursuant to 28 U.S.C. § 2255 in  
11 the court which imposed the sentence. Tripati v. Henman, 843 F.2d  
12 1160, 1162 (9th Cir. 1988). Section 2255 was intended to  
13 alleviate the burden of habeas corpus petitions filed by federal  
14 prisoners in the district of confinement by providing an equally  
15 broad remedy in the more convenient jurisdiction of the sentencing  
16 court. United States v. Addonizio, 442 U.S. 178, 185 (1979).  
17 Under 28 U.S.C. § 2255, a federal sentencing court may grant  
18 relief if it concludes that a prisoner in custody was sentenced in  
19 violation of the Constitution or laws of the United States.

## DISCUSSION

21 The government agrees that Johnson applies to the Sentencing  
22 Guidelines and agrees that, if Movant were challenging his  
23 sentence on direct appeal, his sentence would be subject to  
24 reversal. However, the government argues that Movant waived his  
25 right to bring the current motion. In addition, the government  
26 argues that Movant procedurally defaulted his claim under Johnson  
27 by failing to file a direct appeal and that Johnson's application  
28 to the Sentencing Guidelines is not retroactive.

## 1 I. Waiver

2 The government first notes that Movant's plea agreement  
3 provided,

4 I knowingly and voluntarily agree to waive any right I  
5 may have to file any collateral attack on my conviction  
6 or sentence, including a petition under 28 U.S.C. § 2255  
or 28 U.S.C. § 2241 . . .

7 Docket No. 13 at ¶ 5. Accordingly, the government argues that  
8 Movant has waived his right to bring this motion. However, the  
9 Ninth Circuit has held that a waiver "will not apply if . . . the  
10 sentence violates the law." United States v. Bibler, 495 F.3d  
11 621, 624 (9th Cir. 2007). A sentence violates the law if it  
12 "exceeds the permissible statutory penalty for the crime or  
13 violates the Constitution." Id. Here, the government concedes  
14 that Movant was sentenced under a provision of the Sentencing  
15 Guidelines that is unconstitutionally vague after Johnson.  
16 Accordingly, Movant's sentence is illegal and the waiver in his  
17 plea agreement does not bar the instant motion. See United States  
18 v. Torres, 2016 U.S. App. LEXIS 12941, \*27 (9th Cir.).

## 19 II. Procedural Default

20 As a general rule, "claims not raised on direct appeal may not  
21 be raised on collateral review unless the petitioner shows cause  
22 and prejudice." Massaro v. United States, 538 U.S. 500, 504  
23 (2003). In order to overcome this procedural default resulting  
24 from the failure to raise his claims on direct appeal, Movant must  
25 show cause for the default and actual prejudice, or actual  
26 innocence. Sanchez-Llamas v. Oregon, 548 U.S. 331, 350-51 (2006).  
27 A movant shows cause by demonstrating "that the procedural default  
28 is due to an 'objective factor' that is 'external' to the

1 petitioner and that 'cannot be fairly attributed to him.'"  
2 Manning v. Foster, 224 F.3d 1129, 1133 (9th Cir. 2000) (quoting  
3 Coleman v. Thompson, 501 U.S. 722, 731-32 (1991)).

4 The government argues that "a defendant who failed to raise a  
5 claim on direct appeal must show ineffective assistance of counsel  
6 to establish cause." Docket No. 34 at 7. This narrow  
7 interpretation of cause is not supported by case law. Although,  
8 in most cases, a failure to object or failure to file a direct  
9 appeal that is not attributable to ineffective assistance of  
10 counsel is a procedural default, there are circumstances in which  
11 cause may be found. See, e.g., Reed v. Ross, 468 U.S. 1, 13  
12 (1984) ("Underlying the concept of cause, however, is at least the  
13 [] notion that, absent exceptional circumstances, a defendant is  
14 bound by the tactical decisions of competent counsel.") The  
15 Supreme Court has held that cause is found when "the factual or  
16 legal basis for a claim was not reasonably available to counsel"  
17 at the time a direct appeal was or could have been filed. Murray  
18 v. Carrier, 477 U.S. 478, 488 (1986). Accordingly, the failure to  
19 file a direct appeal when the appeal "would have been futile,  
20 because a solid wall of circuit authority" precluded the appeal  
21 does not constitute procedural default. English v. United States,  
22 42 F.3d 473, 479 (9th Cir. 1994) (internal quotation marks and  
23 citations omitted); see also Kimes v. United States, 939 F.2d 776,  
24 778 (1991) ("failure to object . . . is not fatal to [a § 2255]  
25 petition, since well settled law precluded [the] claim at the  
26 time").

27 In Reed, the Supreme Court held that when one of its  
28 decisions explicitly overrules one of its prior decisions or

1 overturns "a longstanding and widespread practice to which [the  
2 Supreme Court] has not spoken, but which a near unanimous body of  
3 lower court authority has expressly approved" and the new decision

4 is given retroactive application, there will almost  
5 certainly have been no reasonable basis upon which an  
6 attorney previously could have urged a []court to adopt  
7 the position that this Court had ultimately adopted.  
Consequently, the failure of a defendant's attorney to  
have pressed such a claim . . . is sufficiently  
excusable to satisfy the cause requirement.

8 Id. at 17 (internal quotation marks omitted). Here, Johnson  
9 expressly overrules prior Supreme Court cases upholding the  
10 analogous residual clause in the ACCA and the Supreme Court has  
11 held that Johnson is retroactive with respect to ACCA claims.  
12 Welch v. United States, 136 S. Ct. 1257 (2016).

13 Moreover, it is indisputable that, at the time Movant could  
14 have filed a direct appeal, a claim that the residual clause in  
15 § 4B1.2's definition of crime of violence was void for vagueness  
16 would not have succeeded and that "the legal basis for the claim  
17 was not reasonably available to counsel" at that time. Murray,  
18 477 U.S. at 488. Vagueness challenges to the residual clauses in  
19 the ACCA and the Sentencing Guidelines were foreclosed by the  
20 Supreme Court decisions in James v. United States, 550 U.S. 192  
21 (2007), and Sykes v. United States, 131 S. Ct. 2267 (2011).  
22 Accordingly, Movant has demonstrated cause for his procedural  
23 default.

24 As stated above, Movant must also demonstrate prejudice by  
25 showing that the alleged error "worked to his actual and  
26 substantial disadvantage, infecting his entire trial with error of  
27 constitutional dimensions.'" United States v. Braswell, 501 F.3d  
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1 1147, 1150 (9th Cir. 2007) (quoting United States v. Frady, 456  
2 U.S. 152, 170 (1982)). The Supreme Court has not defined the  
3 level of prejudice necessary to overcome procedural default but it  
4 has held that the level is "significantly greater than that  
5 necessary under the more vague inquiry suggested by the words  
6 'plain error.'" Murray, 477 U.S. at 493-94 (quoting Engle v.  
7 Isaac, 456 U.S. 107, 135 (1982)). To show prejudice under the  
8 plain error standard, a defendant must "show her substantial  
9 rights were affected, and to do so, must establish that the  
10 probability of a different result is sufficient to undermine  
11 confidence in the outcome of the proceeding." United States v.  
12 Bonilla-Guizar, 729 F.3d 1179, 1187 (9th Cir. 2013) (internal  
13 quotation marks omitted).

14 The government argues that Movant cannot demonstrate  
15 prejudice because the Sentencing Guidelines are only advisory.  
16 Accordingly, the government notes that this Court "had nearly  
17 unfettered discretion to impose any sentence that Congress made  
18 applicable to his offense." Docket No. 34 at 9. However, even  
19 though the Guidelines are advisory, the Supreme Court has  
20 consistently held that sentencing courts "must treat the  
21 Guidelines as 'the starting point and the initial benchmark.'" Kimbrough v. United States, 552 U.S. 85, 108 (2007) (quoting Gall v. United States, 552 U.S. 38, 49 (2007); see also Peugh v. United States, 133 S. Ct. 2072, 2083 (2013) ("federal sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines")); Gall, 552 U.S. at 50 n.6 ("district courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." ).

1 The Supreme Court recently observed that "when a Guidelines range  
2 moves up or down, offenders' sentences move with it." Peugh, 133  
3 S. Ct. at 2084. An improperly calculated Guidelines range would  
4 "derail[] the sentencing proceeding before it even began." United  
5 States v. Doe, 705 F.3d 1134, 1154 (9th Cir. 2013).

6 Accordingly, the Ninth Circuit has long held that, on direct  
7 review, miscalculation of the Guidelines range constitutes plain  
8 error that affects a defendant's substantial rights. See, e.g.,  
9 id. at 1188 ("We have held that when a sentencing judge  
10 incorrectly calculates the Guidelines range, potentially resulting  
11 in the imposition of a greater sentence, the error affects the  
12 defendant's substantial rights and the fairness of the judicial  
13 proceedings."). Moreover, the Supreme Court recently held that,  
14 absent "unusual circumstances," when a sentencing court improperly  
15 calculates the Guidelines range, the sentence constitutes plain  
16 error, even if the sentence imposed is within the correct  
17 Guidelines range. Molina-Martinez v. United States, 136 S. Ct.  
18 1338, 1347 (2016).

19 Here, this Court considered the enhancement based on the  
20 definition of crime of violence in imposing its sentence. The  
21 Court finds that the constitutional error in calculating Movant's  
22 Guidelines range "worked to his actual and substantial  
23 disadvantage." Frady, 456 U.S. at 171 (emphasis in original).

24 Accordingly, the Court finds that Movant has shown cause and  
25 prejudice sufficient to overcome his failure to file a direct  
26 appeal challenging his sentence.

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## 1 III. Retroactivity

2       The government next argues that, under Teague v. Lane, 489  
3 U.S. 288 (1989), Johnson does not apply retroactively to cases in  
4 which an enhancement based on the definition of crime of violence  
5 in the Career Offender Guideline was applied. In Teague, the  
6 Supreme Court held that newly announced constitutional rules apply  
7 to all criminal cases still on direct review but only apply  
8 retroactively on collateral review if the rule (1) "places certain  
9 kinds of primary, private individual conduct beyond the power of  
10 the criminal law-making authority to proscribe" or (2) is a  
11 "watershed rule[] of criminal procedure." Id. at 304, 311  
12 (internal quotation marks omitted).

13       As stated above, the Supreme Court has held that Johnson is a  
14 new substantive rule because it "changed the substantive reach of  
15 the Armed Career Criminal Act, altering 'the range of conduct or  
16 the class of persons that the [Act] punishes.'" Welch, 136 S. Ct.  
17 at 1265 (quoting Schriro v. Summerlin, 542 U.S. 348, 353 (2004)).  
18 Movant argues that, because the decision in Johnson similarly  
19 limits the application of certain Guidelines provisions and  
20 because it has been found to be retroactive with respect to the  
21 ACCA, it should be retroactive as to those Guidelines provisions  
22 as well. Movant contends that the retroactivity analysis in Welch  
23 applies to the rule set out in Johnson, and does not depend on the  
24 type of case in which the rule is applied.

25       It is true that the rule announced in Johnson applies only by  
26 analogy to the definition of crime of violence in the Career  
27 Offender Guideline. Johnson found that the language in the ACCA  
28 is unconstitutionally vague. While courts, including the Supreme

1 Court and the Ninth Circuit, routinely look to interpretation of  
2 language in the ACCA when considering nearly identical language in  
3 the Guidelines and vice versa, it cannot be assumed that a finding  
4 that Johnson is retroactive as to the ACCA definitively means that  
5 it is retroactive as to the Guidelines. Indeed, the Supreme Court  
6 recently granted certiorari in Beckles v. United States, 2016 U.S.  
7 LEXIS 4142. Among the issues presented in Beckles is whether  
8 Johnson applies retroactively to collateral challenges to federal  
9 sentences enhanced based on the definition of crime of violence in  
10 the Career Offender Guideline.

11 As the government points out, those who meet the criteria of  
12 the ACCA are subject to a statutory mandatory minimum sentence.  
13 In contrast, those who are eligible for enhancements under the  
14 Sentencing Guidelines pursuant to language similar to that found  
15 unconstitutional in Johnson are subject to higher advisory  
16 Guidelines ranges. Therefore, the government argues that, as  
17 applied to defendants who are challenging Guidelines enhancements,  
18 the rule in Johnson is procedural because it "does not alter the  
19 statutory sentencing range or prevent reimposition of the same  
20 sentence without the career offender enhancement." Docket No. 34  
21 at 13. In effect, the government argues that any new  
22 constitutional rules applicable to Guidelines calculations are  
23 neither substantive nor watershed procedural rules under Teague

1 and thus cannot be applied retroactively.<sup>2</sup> As a district court in  
2 the District of Oregon recently observed, there is no Ninth  
3 Circuit or Supreme Court authority to support this position. See  
4 United States v. Dean, 2016 WL 1060229, at \*13 (D. Or.).

5 Indeed, in Reina-Rodriguez v. United States, the Ninth  
6 Circuit determined that an en banc decision which "altered the  
7 conduct that substantively qualifies as burglary under the  
8 categorical approach" for purposes of the ACCA was a substantive  
9 rule and therefore eligible for retroactive application under  
10 Teague. 655 F.3d 1182, 1189 (9th Cir. 2011). Without addressing  
11 whether the retroactivity analysis should be different for cases  
12 under the Guidelines as opposed to under the ACCA, the Ninth  
13 Circuit applied the decision retroactively to a case challenging a  
14 Guidelines enhancement based on the § 4B1.2 definition of crime of  
15 violence. Id. at 1189-90.

16 Moreover, in Welch, the Supreme Court made clear that it  
17 "determine[s] whether a new rule is substantive or procedural by  
18 considering the function of the rule." 136 S. Ct. at 1265. The  
19 Welch Court held that the rule in Johnson was substantive because  
20 it "affected the reach of the underlying statute rather than the  
21 judicial procedures by which the statute is applied." Id.  
22 Applying Johnson to the Guidelines likewise affects the reach of  
23 those Guidelines that rely on the definition of crime of violence

24 \_\_\_\_\_  
25 <sup>2</sup> The government also argues that any Guidelines calculation  
error is a "procedural error" rather than "substantive error."  
26 However, the terms "procedural error" and "substantive error" are  
27 terms of art related to direct appellate review of sentences and  
28 are not applicable here. See Gall v. United States, 522 U.S. 38,  
51 (2007).

1 in the Career Offender Guideline but "has nothing to do with the  
2 range of permissible methods a court might use to determine"  
3 whether those Guidelines apply. Id. As it does for the ACCA,  
4 "Johnson substantively changes the conduct by which federal courts  
5 may enhance the sentence of a defendant under the Guidelines."  
6 Dean, 2016 WL 1060229, at \*16. Accordingly, Johnson applies  
7 retroactively to Movant's case.

8 CONCLUSION

9 For the foregoing reasons, the Court will GRANT Movant's  
10 § 2255 motion. Docket No. 25. The Court will vacate and set  
11 aside the judgment at Docket Number 20. A sentencing hearing will  
12 be held on October 18, 2016 at 2:00 PM. The Probation Office is  
13 directed to prepare an updated Presentence Investigation Report,  
14 including post-conviction information such as the extent of any  
15 post-conviction rehabilitation. The parties shall file their  
16 sentencing memoranda at least one week prior to the hearing.

17 IT IS SO ORDERED.

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19 Dated: August 3, 2016

  
CLAUDIA WILKEN  
United States District Judge

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